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No. 00-568

In The
Supreme Court of the United States

People of the State of New York and the Public Service Commission of the State of New York, et al.
Petitioners,

v.

Federal Energy Regulatory Commission, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

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In defending FERC's attempt to preempt state regulation of retail transmission service, FERC and its supporters implicitly argue that the 1935 Congress inadvertently laid the groundwork for preemption when it authorized FERC to regulate the "transmission of electric energy in interstate commerce" (§ 201(b)). Two factors -- (1) unbundling of the commodity from the rest of the retail customer's bill (FERC 20-21, 39); and (2) added interconnection between utilities (FERC 31-33) -- allegedly transform FERC's § 201(b) authority from permission for FERC to do what the states could not do (regulate transmissions for wholesale transactions) to a license to preempt what the states have always done (regulate retail transmissions). As shown below, the respondents' defense of Order 888 is grounded in (1) an erroneous standard of review; (2) a misreading of the Federal Power Act (FPA); and (3) misplaced policy contentions.

I. THE STANDARD OF REVIEW

The Court will not endorse preemption of fundamental state regulation that preceded an agency's enabling legislation absent a "clear and manifest" showing that it was intended by Congress. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). Order 888 and FERC's brief admit that Congress did not contemplate FERC preempting state regulation of retail transmissions (Joint Appendix, J.A. 347, 593-95; FERC 20, 38-39, 47).

FERC argues, however, that (a) retail transmission service did not exist before unbundling; (b) § 201(b) authorizes FERC to regulate retail transmissions; (c) this Court's decisions support FERC preemption; and (d) if retail transmissions are carried by several utilities across a number of states, only FERC will be able to regulate them (FERC 38-42).

A. FERC's "New Service" Theory

Utilities have delivered (transmitted and distributed) electricity to retail customers since the 1880's (Phillips, "The Economics of Regulation," p. 551 (1969)). In 1935, when the FPA was enacted, Congress knew that the states were regulating retail deliveries and took pains not to disturb their jurisdiction (State Petitioner's Appendix in Support of Petition for Certiorari, Pet. App. L-34). Connecticut Light & Power Co. v. Federal Power Comm'n, 324 U.S. 515, 526 (1945).

FERC contends that retail transmission service, bundled in retail rates for 90 years, became "new" when unbundling of the commodity allowed customers to choose not what company would provide them retail transmission service, but what company would supply their electric energy (FERC 20-21). Retail transmission service has always been a sine qua non of consumers receiving electricity and it has been regulated by the states since the early 1900's. See Curtis, The Law of Electricity, 1-8 (1915). Irrespective of changes in a utility's billing format,[1] retail transmissions take place over the same utility facilities, at the same costs to utilities and, absent FERC preemption, at the same rate for consumers.

Any question as to whether retail transmission service existed in 1935 is answered by this Court's conclusion in Jersey Central Power & Light Co. v. Federal Power Comm'n, 319 U.S. 61, 74 (1943), that § 201(a)'s preservation clause safeguarded state regulation of "transmission." The only transmission to which the Court could have been referring

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[1] The States' brief established the irrationality and internal inconsistency of FERC's premise that commodity "unbundling" changed the nature of monopoly delivery service (States 27, 35-36). FERC's brief does not answer either point.

was retail transmission because transmissions for wholesale transactions were not subject to state regulation.[2]

B. FERC's Claim To Deference

The States' brief presented several reasons why FERC's reading of the FPA was not entitled to deference (States 16-17). FERC responds that its position deserves deference because Congress could constitutionally preempt retail transmissions (FERC 40 n.20). Congress' ability to preempt retail transmissions is not relevant to whether it has actually done so.

FERC also alleges that its reading of the FPA does not contradict its prior statements to Congress, or the Court. In congressional testimony, FERC has repeatedly stated that the FPA does not allow it to set retail rates. E.g., Hearings before the Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess. (1935), "1935 Hearings on H.R. 5423," at 498; Hearings Before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess. (1967), "1967 Hearings on H.R. 5348," at 124. Its current position -- that the FPA allows it to set retail transmission rates (FERC 39-40) -- contradicts those statements.[3] When a federal agency's reading of a statute

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[2] In support of an allegation that FERC has regulated unbundled retail transmissions in the past, TAPS cites several FERC decisions that ostensibly regulate retail transmissions (TAPS 38-40). The cases are not relevant because they involved unique facts, such as service to "a critical national defense facility" (Pacific Gas & Electric Company, 1991 FERC LEXIS 2078 at *6-7) and transmission rates that in some instances were set by the states. Further, agency action unreviewed by a court does not establish agency jurisdiction.

[3] FERC accuses the States of asking the Court to write an amendment to the FPA similar to the "Hinshaw Amendment" (FERC 33 n.16). When Congressman Miller, in 1947, introduced a Hinshaw-like amendment in response to state concerns that FERC was

contradicts prior statements to Congress, it does not warrant deference. See Food and Drug Admin. v. Brown and Williamson Tobacco Co., 529 U.S. 120, 155-157, 120 S. Ct. 1291, 1312-1314 (2000).

C. FERC's Stare Decisis Argument

By assuming that Jersey Central, Connecticut Light & Power and Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453 (1972), support its position, FERC argues that it should not have to show that Congress clearly intended to authorize its preemption of retail transmissions (FERC 41). If FERC's interpretation of these holdings were accurate, which is not the case (Point II.D.2), the decisions might offer a basis for satisfying the Cipollone standard. They would not, however, provide a basis for ignoring it.

D. FERC's Claim Of A Jurisdictional Void

FERC contends Cipollone should not apply because if FERC cannot preempt the states, there will allegedly be a jurisdictional void with regard to multi-state retail transmissions (FERC 38-39). Transmissions crossing several states (and various utility service territories) generally involve sales of electric energy for resale. An example would be the sale of energy by Narragansett Electric to Attleboro, which resold to its customers. Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). Because such transmissions carry electric energy that will ultimately be distributed by the buyer to the consumer, they are subject to FERC jurisdiction (Point II.A.). If a retail customer were to buy directly from a distant generator and

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encroaching on state authority, FERC testified that such an amendment was unnecessary because "[t]he field of retail rates ... whether interstate commerce was involved or not was reserved for the States." Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 2972 and 2973, 80th Cong., 1st Sess. (1947), "1947 Hearings on H.R. 2972 and 2973," at 486-487.

arrange for multi-state retail delivery through several utility systems, with no intervening purchaser of the energy, the non-discriminatory retail transmission tariffs established by each state would apply (see Point III). See Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n, 461 U.S. 375, 395 (1983) [despite the fact that most retail utilities sell interstate, "the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility charges largely to the States"]. There would be no jurisdictional void.

Order 888 is an extraordinary example of an administrative agency attempting to use circumstances that, under its own preemption theory, were not envisioned by Congress (FERC 20-21) to supplant state regulation that Congress insisted "was not [to be] disturbed." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 27 (1935). It does not pass muster under Cipollone.

II. FERC AND ITS SUPPORTERS HAVE MISREAD THE FPA

A. Section 201(a) - "Federal Regulation Of Transmission And Sale Of Electric Energy"

Section 201(a) describes two sides of the same coin. The first side sets forth the scope of federal interest and federal regulation. The second side defines what FERC may not regulate.

Side one declares a federal interest in "the business of transmitting and selling electric energy," not for consumption, but "for ultimate distribution to the public." It then states that FERC may regulate generation, under limited circumstances, and "that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." For several reasons, side one of § 201(a) has to be read as limiting FERC's jurisdiction to transmissions for wholesale transactions.

First, the transmissions being regulated by FERC are part of a "business" that transmits and sells energy not for consumption, but for "ultimate distribution" by the buyer to the public. Inasmuch as the initial buyer of such energy resells, rather than consumes, it, the transmission to that buyer for "ultimate distribution to the public" (another sale) is a transmission for a wholesale sale.

Second, if there is any question whether the "business" described in the introductory clause (transmitting and selling energy "for ultimate distribution to the public") is a wholesale business, the matter is resolved by side one's language limiting FERC's jurisdiction to the sales for resale and associated transmissions by that business. By specifying that FERC would regulate the "transmission of electric energy in interstate commerce and the sale of such [transmitted] energy at wholesale in interstate commerce ...," Congress left no question that the universe of transmissions subject to FERC regulation was limited to transmissions of energy sold at wholesale ["the sale of such [transmitted] energy at wholesale"].[4]

FERC's position that § 201(a)'s statement of federal interest "confirms that the Commission has jurisdiction over ... interstate transmission of energy (whether for wholesale or retail sales)" (FERC 20, 34) is incorrect. One in "the business of transmitting and selling electric energy for ultimate distribution to the public" is in a wholesale business. In allowing FERC to regulate the part of that business that transmits energy to be sold at wholesale, Congress

[4] In attempting to distinguish § 201(a)'s reference to "the transmission of electric energy in interstate commerce" from "the sale of such energy at wholesale in interstate commerce" (TAPS 19), TAPS simply loses sight of the fact that the "such energy" language of the second phrase qualifies the energy over which FERC has transmission jurisdiction.

unequivocally limited FERC's jurisdiction to transmissions for wholesale transactions.

The flip side of § 201(a) provides that federal regulation cannot extend to matters subject to regulation by the states. The Court in Jersey Central, 319 U.S. at 74-75 (1943), noted that § 201(a)'s preservation clause "is directed at ... transmission." Side two like side one, therefore, prohibits FERC from regulating retail transmissions, which were -- by FERC's testimony in 1935 -- a matter subject to rate regulation by the states (1935 Hearings on H.R. 5423 at 556).

FERC's insistence that § 201(a)'s preservation clause "cannot nullify a clear and specific grant of jurisdiction" (FERC 34) is a red herring. Section 201(a)'s federal interest applies only to transmissions for wholesale transactions and, as FERC admits, "Section 201(a) states the same rule as Section 201(b)" (FERC 34). In safeguarding the states' pre-existing retail transmission jurisdiction, therefore, § 201(a)'s preservation clause does not conflict with a grant of jurisdiction to FERC.

Perhaps recognizing that § 201(a)'s plain language preserves state jurisdiction of all retail transmissions, EEI incorrectly contends that even if § 201(a) reflects "a policy of giving the States jurisdiction over any area that they could regulate," the states were barred by the Commerce Clause in 1935 (as interpreted in Attleboro) from regulating retail transmissions in interstate commerce (EEI 23-24). Attleboro held that because Rhode Island's regulation "involved a transaction at wholesale, it imposed a direct rather than an indirect burden on interstate commerce" (emphasis added). Arkansas Elec. Coop., 461 U.S. at 378 (1983). The Court did not express concern with state regulation of retail

transmissions.[5] See Elsbree, Interstate Transmission of Electric Power, 57-85, 99 (1931).

B. Section 206(d)

At the risk of stating a truism, rates that recover retail transmission costs are, or include, retail transmission rates. The States' brief noted that (a) § 206(d) assumes that retail rates set by state commissions recover interstate retail transmission costs and (b) FERC's brief in Connecticut Light & Power, acknowledged this point. FERC Brief of December 1944, pp. 28-29, citing in part H. Rep. No. 1318, 74th Cong., 1st Sess., p. 29 (States 24, 40).

Respondent Enron argues that FERC's brief "acknowledges only that states have jurisdiction over the rates for 'sale to the ultimate consumer'" (Enron 28 n.17). FERC, and Congress, would not have cited FERC's provision of interstate transmission costs to the states if they had envisioned state ratemaking jurisdiction being limited to the commodity.[6] Indeed, as indicated, Congress was aware that

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[5] The Court cited Mill Creek Coal v. Public Serv. Comm'n, 100 S.E. 557 (W. Va. 1919), to establish that transmissions for wholesale transactions across state lines were in interstate commerce, not -- as EEI seems to imply -- to question the ability of states to regulate interstate retail transmissions. 273 U.S. at 86. As discussed below, the Court in Federal Power Commission v. Southern Cal. Edison Co., 376 U.S. 205 (1964) rejected a contention that a new reading of the Commerce Clause would diminish FERC jurisdiction under the FPA. It did not hold, however, as EEI implies, that retrospective readings of the Commerce Clause were relevant to the FPA's meaning.

[6] In explaining § 206(d)'s reference to transmission costs, FERC Solicitor DeVane stated the Commission would provide state regulators with the costs of out-of-state transmission lines. (Pet. App. L-24). When asked by Congressman Lea, "would that be with the idea of affording the state commissions ample information upon which to base rates?", Mr. DeVane answered: "Yes, sir" (Pet. App. L-

the bulk of the retail customer's bill recovered the utility's delivery costs (1935 Hearings on H.R. 5423 at 556).

Sections 201(a), 206(d) and repeated statements from FERC and the Congress demonstrate that Congress did not intend FERC to regulate retail deliveries (e.g., 79th Cong. Rec. 10378 (daily ed. June 28, 1935) [wherein Congressman Lea concluded that "the Federal Power Commission does not fix the rate of delivery" in a retail transaction]). Congress did intend, however, that state regulated, retail rates would recover interstate, retail transmission costs (Id.). Order 888 nullifies Congress' intention.

C. Section 212(h)

In 1992, Congress empowered FERC to require wholesale, not retail, wheeling (§ 212(a)) and directed that "[n]othing in this subsection shall affect ... State law concerning the transmission of electric energy directly to an ultimate consumer." The States' initial brief pointed out that Congress in 1992 would not have safeguarded state regulation relating to retail transmissions if it had already authorized FERC to preempt such regulation (States 36). Rather than attempt to reconcile its expansive reading of § 201(b) (discussed below) with § 212(h)'s explicit prohibition of preemption, FERC insists that it did not violate § 212(h)'s directive against mandatory retail wheeling (FERC 36-37). No party has suggested that FERC ordered retail wheeling, but FERC has preempted state laws that direct state commissions to regulate retail transmission service.

TAPS argues that § 212(h) simply preserves the discretion of states not to require utilities to transmit competitors' electricity to retail customers and then speculates that there would have been no need to provide such protection unless Congress, in § 201(b), had established

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25).

FERC's jurisdiction to regulate retail transmissions (TAPS 26-29). Its argument is inconsistent with FERC's acknowledgment that § 201(b) did not empower it to order retail wheeling. If FERC was not empowered in 1992 to order retail wheeling, then § 212(h) had to reflect Congress' intention to safeguard "State law concerning the transmission of electric energy directly to an ultimate customer." Order 888 preempts a portion of such laws.

D. Section 201(b)

Because electric energy, like any commodity, is either consumed or resold, § 201(a)'s and (b)'s references to sales of "energy at wholesale" clearly define FERC's commodity jurisdiction. Energy transmission, like any delivery service, is a prerequisite to a retail or wholesale sale of the commodity, but, unlike a commodity, it is not consumed or resold. In order to permit meaningful regulation of wholesale and retail transactions, Congress, therefore, delineated federal/state transmission jurisdiction in terms of the specific transaction being effectuated, with transmissions for "the sale of . . . energy at wholesale" (§ 201(a)) being FERC jurisdictional and transmissions "directly to an ultimate customer" (§ 212(h)) being state jurisdictional.

The respondents claim that § 201(b) assigns FERC jurisdiction of all transmissions because "wholesale" does not appear before "transmission" in the first clause (FERC 24). As indicated, placing "wholesale" before transmission in § 201(b) would have drawn more questions than answers. For example, because the second sentence of § 201(b) refers to the transmission described in clause 1 in granting FERC jurisdiction over facilities (for "such transmission") and § 201(e) defines public utilities as companies that own facilities subject to FERC's jurisdiction, inserting "wholesale" before "transmission" in § 201(b)'s first clause would have reduced the companies subject to FERC jurisdiction.

When read together, clauses 1 and 2 of § 201(b) provide FERC jurisdiction to encourage interconnection and to fulfill its § 206(d) obligation to facilitate the states' setting of retail rates. Section 201(b) states the same rule as § 201(a) (FERC 42), and § 201(a) denies FERC jurisdiction of retail transmissions. FERC's reading of § 201(b) places it in conflict with not only § 201(a), but §§ 206(d) and 212(h).

1. Legislative History

The States' initial brief cited legislative history that demonstrated Congress' intent to preserve pre-existing state jurisdiction over retail deliveries (States 18-33). The respondents argue that the history refers only to state jurisdiction over retail commodity sales (FERC 37-39).

At the 1935 Hearings on the FPA, FERC testified that the states were regulating retail deliveries (Hearings on H.R. 5423 at 556) and that the FPA took no authority from the states (Pet. App. L-34). Twelve years later, FERC reiterated that it had no authority over retail rates. See 1947 Hearings on H.R. 2972 and 2973 at 486, 489. In 1967, FERC Chairman White testified that "this State [retail] function covers more than 90 percent of the electric revenues of jurisdictional public utilities" (Pet. App. H-14). In order for Chairman White's "more than 90 percent" statement to have been accurate, it had to have included retail transmission revenues. Energy Information Administration/Annual Review 1999 Table 8.1 (1949-1999).

Enron and FERC contend that the states have misstated relevant legislative history by citing a statement by Solicitor DeVane, but omitting a clause (FERC 32; Enron 27). The quotation of Solicitor DeVane that is challenged by FERC and Enron, upon reflection, was inapt, but not for the reasons argued by FERC and Enron (the exclusion of "unless they are also a part of the facilities that are used in interstate commerce" (FERC 32; Enron 27)). The language cited was not relevant because it concerned a legislative provision that was

not adopted and -- in any event -- addressed FERC's jurisdiction over companies, not services. See Pet. App. L-30 through L-36.

The FPA's legislative history establishes that FERC's rate jurisdiction does not include retail transactions (S. Rep. No. 74-621, at 48 (1935)). Accord, e.g., id. at 20, 51; Hearings Before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., "1935 Hearings on S. 1725," at 247 (1935) (section-by-section analysis); id. at 268; 1935 Hearings on H.R. 5423 at 386 (section-by-section analysis). FERC and its supporters have not only failed to refute this history, but have pointed to no evidence of a congressional intent that if the retail commodity was unbundled from retail delivery service, then jurisdiction over the transmission element of retail deliveries would shift to FERC.

2. Case Law

FERC and its supporters contend that this Court's decisions in Jersey Central, 319 U.S. 61, Connecticut Light & Power, 324 U.S. 515 and Florida Power & Light, 404 U.S. 453, establish that all transmissions are in interstate commerce and "provide 'cardinal and guarding' interpretations of Sections 201" (FERC 40-41). Inasmuch as Congress preserved the states' jurisdiction of all retail transmissions, the respondents' attempted use of the cases is misplaced, as well as incorrect.

In Jersey Central, the Court held that because some energy generated by Jersey Central arrived in New York State from an intervening company's transmission lines, Jersey Central was a public utility under § 201(e) and its stock purchases were subject to FERC jurisdiction. The case affirms that (a) although a company may be a public utility under subsection (e), all of its transactions do not thereby fall under the regulatory power of the Commission (319 U.S. at 73); and (b) while § 201(a)'s preservation of pre-existing state regulation naturally could not override the FPA's explicit delegation to FERC of jurisdiction over Jersey Central's

financial arrangements, it did apply to "generation, transmission and sale" (emphasis added) (319 U.S. at 74).

Connecticut Light & Power held that FERC lacked jurisdiction over a company unless the company's facilities were used for interstate transmission (as opposed to distribution) of electric energy (324 U.S. at 522). Because the FPA denies FERC jurisdiction over retail transmission service (including interstate retail transmissions), the Court need not determine when a particular transmission is in interstate commerce.[7] If, however, the Court determines that the states may only regulate intrastate retail transmissions, then, as Connecticut Light & Power noted, § 201(c)'s definition of such transmissions would control.[8]

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[7] FERC, TAPS and EEI contend that the states have altered their position from the D.C. Circuit insofar as they argue that the FPA preserves the states' jurisdiction over all retail transmissions, as opposed to simply intrastate retail transmissions (FERC 28). The wording of the States' questions for certification does not preclude the States from establishing that the FPA safeguarded the states' jurisdiction over all retail transmissions, including those in interstate commerce. If FERC cannot preempt any retail transmissions, it certainly cannot preempt intrastate retail transmissions and, therefore, the respondents' claims regarding a change of position go solely to the scope of a remedy on remand. See Procunier v. Navarette, 434 U.S. 555, 559-560, n.6 (1978); Vance v. Terrazas, 444 U.S. 252, 258-259 (1980). Moreover, even as to a FERC decision on remand, a federal agency must abide by its jurisdictional limitations, irrespective of the wording of prior jurisdictional claims. Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. at 374 ["an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it"].

[8] See Chicago Dist. Elec. Corp., 2 FPC 416 (1941) [wherein FERC concluded the supplying of electric energy by one company to another, whose operations were entirely in the same state, did not involve a transmission of electric energy in interstate commerce as defined in § 201(c) of the Federal Power Act, even though a portion

Enron mischaracterizes the Court's decision in Connecticut Light & Power, by claiming that the Court adopted "an engineering and scientific, rather than a legalistic or governmental test . . . ." Enron 18. In support of its allegation, Enron quotes a statement from the decision relating to a bill that FERC had proposed. Enron does not point out, as did the Court, that Congress amended the bill to protect state jurisdiction (324 U.S. at 529). In language particularly applicable to the brief of amicus curiae physicists (discussed below), the Court stated "state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress . . . sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is sacrificed." Id. at 530.[9]

FERC contends that Florida Power & Light stands for the proposition that all retail transmissions are in interstate commerce because the Court rejected the utility's claim that none of Florida Power & Light's power was in interstate commerce (FERC 33). The holding that one or more of the electrons transmitted in Florida Power& Light's transmission lines were in interstate commerce does not support an induction that all electrons transmitted by interconnected companies are in interstate commerce.[10]

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of the electric energy so supplied went to another state and then re-entered the original state without any such electric energy being taken or used within the second state.

[9] Electric customers are normally not served by a single pool of random energy (the "theory of unified electric response") except under abnormal or transient conditions (Phys. 15-17). Electric service is continuously monitored by system operators who balance energy flows within control areas (Eng. 23) and direct power flows from generators to load. J.A. 836-839. (See Point III.)

[10] FERC also mistakes jurisdiction over companies for jurisdiction over services when it cites Justice Douglas' dissent as supporting its position. Justice Douglas was, perhaps, prescient of FERC's craving

FERC assured this Court in Florida Power & Light that the case involved whether a particular utility fell within FERC's jurisdiction. FERC Petition for Writ of Certiorari to the United States, November, 1970, p. 10; FERC Brief on the Merits, May, 1971, p. 20. Its claim today that Florida Power & Light supports its attempt to regulate retail transmission rates contradicts its prior position (See Pet. H-31).

FERC also cites the Court's decision in United States v. California Public Utilities Comm'n, 345 U.S. 295 (1953) as supporting a broad reading of its § 201(b) jurisdiction (FERC 34). In determining whether FERC's jurisdiction under the FPA included rate regulation of wholesale commodity sales, the Court in United States v. CPUC focused on the Act's legislative history, reiterated that it was Congress' intent to fill the Attleboro gap (while preserving pre-existing state regulation) and concluded that FERC's jurisdiction extended to wholesale sales. 345 U.S. at 307-311. The holding provides no support for FERC's position in this case.

There simply is no case law that supports FERC Order 888 because the FPA preserved pre-existing state regulation and did not assign FERC jurisdiction of retail transmission service.[11]

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for greater authority when he stated " . . . the Congress promised that as much as possible be left to the States, I would not make that a hollow promise . . . the federal camel has a tendency to occupy permanently any state tent" (404 U.S. at 470). However, his observation that the majority's holding would render every privately owned interconnected facility subject to FERC's jurisdiction does not support FERC's attempt to regulate retail transmission service (FERC 32-33).

[11] The respondents cite decisions under the Natural Gas Act (NGA), but -- as indicated in the States' May 2001 brief -- the decisions are not relevant because -- among other things -- the NGA does not include an equivalent to §§ 201(a) or 212(h) (States 12-16). Indeed, under the NGA, FERC has the authority to approve and regulate

III. THE RESPONDENTS' POLICY ARGUMENTS

Enron, FERC and other respondents argue at length that because of increased interconnection all electricity on the interconnected grid is in interstate commerce. (FERC 26; Enron 21). While the 1935 Congress empowered FERC to encourage interconnection in order to facilitate regional coordination, it did not even insinuate an inverse relationship wherein increased interconnection would decrease state jurisdiction over retail services. See Federal Power Comm'n v. Southern Cal. Edison Co., 376 U.S. 205, 213-217 (1964) [which noted that FERC's jurisdiction was set by Congress in 1935 and could be neither increased nor decreased without congressional action]. Increased interconnection does not alter jurisdictional lines. See Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395, 422-423 (1975).

The respondents TAPS and Enron allege that if FERC is not permitted to supplant state regulation of retail transmissions, utilities will provide discriminatory transmission service (TAPS 34-35; Enron 39-41, 43). FERC does not have to preempt state regulation of retail transmission service in order to assure nondiscriminatory access to transmissions associated with wholesale transactions. When the Circuit Court upheld FERC's wholesale open access Order, nondiscriminatory transmissions for wholesale transactions became required by law. FERC's ability and willingness to enforce its Order will determine the openness of transmissions for wholesale transactions.[12]

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certification, construction and abandonment of gas transmission facilities. 15 U.S.C. § 717f. Under the FPA, by contrast, FERC has no such authority. Thus, FERC has traditionally regulated 90% of the gas industry, but only 15% of the electric industry.

[12] State regulation, as indicated in the States' May, 2001 brief in 00-809, is more than capable of addressing utility discrimination against retail providers (States 18-22) and will provide a healthy supplement

Enron also alleges that state regulation of retail transmission is "a recipe for state-against-state discrimination" (Enron 3, 14-16, 41-42).[13] Its claim is belied by not only history, but accelerated efforts at the state level to assure cooperation.[14] If one or more states discriminate against out-of-state suppliers (or out-of-state consumers), corrective action is available under the Commerce Clause (see West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 114. S. Ct. 2205, 2215-6 (1994)). Nearly all states realize it would be shortsighted to exclude competitors' electricity, and thereby deny their own consumers (and economies) opportunities for economic growth.

The Pennsylvania Public Utility Commission contends that Northern States is "manifestly erroneous" and that FERC preemption is necessary to counter parochial state interests, such as those safeguarded by the Eighth Circuit (Pa 8-9).[15] At

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to federal efforts.

[13] As an alleged example of state "discrimination," Enron points to California's statement that states commonly require electric utilities to protect retail customers during capacity constraints (Enron 41-42). Enron's claim is simply an attempt to relitigate the arguments it unsuccessfully raised in Northern States Power Co. v. Federal Regulatory Energy Comm'n, 176 F.3d 1090 (8th Cir. 1999), cert. denied, sub nom., Enron Power Marketing Inc. v. Northern States Power Co., 528 U.S. 1182 (2000).

[14] E.g.: NECPUC: New England Conference of Public Utilities Commissioners, Inc.; MACRUC: Mid-Atlantic Conference of Regulatory Utilities Commissioners; MARC: Mid-America Regulatory Commissioners; SEARUC: Southeastern Association of Regulatory Utility Commissioners; WCC: Western Conference of Public Service Commissioners. The states of these regions have developed these coalitions to address multi-state issues in a manner that assures coordination while recognizing local conditions.

[15] Northern States upheld the states' (and presumably the nation's) priority of safeguarding native load. See, e.g., Legislative History of

FERC, the Pennsylvania PUC just as vehemently opposed FERC preemption of retail transmission service, stating that "FERC is impermissibly attempting to expand its jurisdiction, not by virtue of new statutory authority, but by an impermissibly broad and technically insupportable re-definition of existing statutory authority" (Pennsylvania PUC Petition for Rehearing dated May 23, 1996 at 27). Pennsylvania never explains its change of position or why it assumes that states that have unbundled to promote retail competition would decide to impede competition by sabotaging the wholesale system. Its arguments are implausible.

The United States has benefitted considerably from the use of states as national laboratories. Federal Energy Regulatory Comm'n v. Mississippi, 556 U.S. 742, 788 (O'Connor, J., dissenting) (1982). A one-size-fits-all policy for transitioning to competitive retail electricity markets -- developed by a single, ill-equipped regulatory agency[16] -- is a recipe for a diminution of service, unnecessarily high rates and unresolved customer complaints.

Respondent Enron alleges that FERC preemption of retail transmission is needed to ensure uniform transmissions across state borders (Enron 39-40). Although Order 888 has been in effect for several years, transmission continues to be state-specific due to unique local and regional conditions, including transmission limitations between states, as well as the isolation of the eastern and western interconnections from each other and the Texas grid. Order 888 has impeded the development of new transmission capacity because the FERC transmission rate formula does not recover new transmission

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the Energy Policy Act of 1992: Prepared for the Senate Comm. On Energy and Nat. Resources, 103 Cong., 2nd Sess., Vol. 5 at 3837 (1994).

[16] Randazzo, Has Federal Energy Regulation Collapsed?, 14 Electricity Journal, 11-20 (April 2001).

capital costs, except when paid for by marketers or to prevent grid failure. Further, although the States have every incentive to encourage new transmission facilities, and transmission innovation, their ability to do so is diminished by FERC's control of retail transmission rates. For example, in some regions, depending on transmission configurations, new technologies can substantially increase the efficiency of available transmission facilities and thereby reduce the need for new electric generation facilities. The installation of such equipment requires retail transmission rate designs that encourage investment by rewarding increased efficiency. Order 888 defeats the ability of states to design such rates.[17]

The respondents' suggestion that continuing the states' pre-Order 888 regulation of retail transmission rates would impede the operation of the grid ignores the proven ability of computer programs to accommodate multi-state operations.[18] Each state will continue to have retail transmission rates on file that will be applied, by computer program, to particular transactions just as transactions today reflect the FERC Open Access Transmission Tariff (OATT) in some instances and not

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[17] FERC largely ignored the states' policy observations (States 46-48), arguing that states would retain authority over local reliability and customer service (FERC 42). FERC-induced, as opposed to statutorily designed, split regulation of local services invites long-term problems. See Weiser, Chevron, Cooperative Federalism, and Telecommunications Reform, 52 Vand. L. Rev. 1 (1999); Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C.L. Rev. 663 (2001).

[18] For decades prior to FERC's issuance of Order 888, two multi-state power pools adhered to a computer program that called for a sharing of energy between various utilities with automatic billing mechanisms that assured equity and the usage of the least expensive generation at any moment in time to meet marginal demand on the network. The New York Power Pool oversaw a similar arrangement among New York's seven utilities. States are currently discussing the widespread application of such models on regional bases.

in others (depending upon whether a rate in a particular state is bundled).

Congress would not have safeguarded state regulation of delivery rates when energy crosses state lines if it had been concerned with the states' ability to regulate interstate transmissions (79 Cong. Rec. 10378 [daily ed. June 28, 1935]). In fact, inasmuch as Congress assigned the states jurisdiction of transmissions for wholesale transactions across international borders (§ 202(f)), it clearly preferred state regulation of transmissions when constitutionally permissible.

CONCLUSION

The FPA was explicitly designed not to preempt state law (FERC 38). Congress, well aware of the stresses and strains on the FPA's regulatory scheme in recent years, has not changed the Act.[19] In attempting to jerry-build a rationale for new jurisdictional lines, FERC has subverted the will of Congress. Order 888, insofar as it preempts state regulation of retail transmission service, should be annulled.

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[19] Congress was asked annually from 1997-2000 to authorize FERC regulation of retail transmission service, but did not do so. See, e.g., H.R. 655, 105th Cong., 1st Sess. (1997).

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